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In the Supreme Court of the United States

BANK OF OXFORD,
Plaintiff in Error.

vs.

J. S. LOVE, et al,
Defendant in Error.

BRIEF FOR APPELLANT

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ASA PRINTING COMPANY, CHATTANOOGA, TENNESSEE

In the Supreme Court of the United States

BANK OF OXFORD,
Plaintiff in Error,

vs.

J. S. LOVE, *et al,*
Defendant in Error.

ABSTRACT.

This is an appeal from a decision of the Supreme Court of the State of Mississippi affirming a decree of the Chancery Court of Hinds county sustaining a demurrer to an original bill filed by the plaintiff in error, the Bank of Oxford, which bill seeks to restrain the enforcement of the Mississippi Banking Law and to recover certain taxes collected thereunder.

Briefly states, the facts and the allegations confessed by the demurrer are that the Bank of Oxford was organized under and incorporated by a special act of the Mississippi legislature, approved in March, 1872, (,— at which time there were no constitutional restrictions upon the granting of such charters, and, more especially, there were no constitutional restrictions upon such surrenders of

legislative powers as might be made therein; the first constitutional restrictions along such lines appearing for the first time in the Constitution of 1890).

The incorporating act was promptly accepted by the appellant, the requisite amount of capital stock paid in, and the corporation duly organized and commenced its banking business under such charter,—which authorized a general banking, brokerage, and exchange business—, and has conducted its business continuously from the date of its organization to date.

At the 1914 session of the Mississippi legislature, there was passed a general banking law, supervising and regulating in detail all banks in the state subject to its provisions, similar in its general features to the recent Deposits Guaranty Acts passed in several of the States; and upon the state bank authorities insisting that appellant comply with the provisions of the law, the bank paid under protest the taxes assessed against it and filed the original bill, in which it set up its charter as a contract protected by Article I, Section X, of the Constitution of the United States,—the Contract Clause,—and invoked its immunity and exemption from such control by the legislature and prayed for a perpetual injunction, restraining the enforcement of the law against it, together with a recovery of the taxes paid under protest.

A demurrer was interposed to the bill, which was sustained by the Chancellor and the Supreme Court of the State, in turn, as noted above. 111 Miss., 699.

The bill specifically enumerates many provisions of the law that are alleged to impair the provisions on the charter. We will not set these forth for the reason that we do not think this court will find it necessary to consider particular provisions of the Act: for if appellant argument is

sound in the main, the business of the bank cannot be regulated at all, when the regulations take the character of the act under review.

Under Section 4 of the bank's charter, which section the bill expressly invokes, it is provided:

> "That the business of said bank shall be confided to and controlled by its stockholders under such rules of law and regulations as said company may see fit to adopt, provided that the same be not in conflict with the Constitution of the United States or of this state."

This is plain English and must be construed according to the common import of the terms. It is provided, in so many words, that the business of the bank shall be confided to the stockholders, and that the business of the bank shall be controlled by them, under such rules of law and regulations as they may see fit to adopt.

To such provision there is a *proviso,* and that *proviso* wholy excludes the idea that the section was a mere formal enumeration of powers, such as occurred in the charter the N. J. & C. R. R. Co. (N. J. & C. R. R. Co. v. State, 62 Miss., 646).

The object and effect of the *proviso* is plainly to exclude the legislature from any further action, in so far as the business of the bank is concerned; and any regulation of the bank's business would manifestly be an impairment of the grant. *Expressio unius exclusio alterius est.*

This was conceded by the Supreme Court; and the decision was placed wholly upon the proposition that the charter did not constitute a binding contract within the protection of the Contract Clause because *ultra vires* and voidable:

"This raises the question of whether or not such rights of exemption, as claimed by the appellant bank under its charter, could be lawfully granted to it by an act of the legislature of 1872. In other words, did the legislature have the power and the authority to grant to the appellant bank, through its charter, immunity and exemption from any reasonable regulations that might thereafter be imposed by the state under its inherent police power? We think not. It is contended by counsel for appellant that this kind of legislative contract cannot be restricted or controlled by the police power of the state, but that the police power extends only to matters effecting the public health or the public morals; but we think the authorities have settled the law contrary to the contention of counsel for appellant.

"The police power in its broadest acceptation means the general power of a government to preserve and promote the general public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest'. 22 Am. and Eng. Enc. Law, 916.

" 'The police power is a governmental function, and neither the state legislature, nor any inferior legislative body to which a portion of such power has been granted, can alienate, surrender, or abridge the right to exercise such power by any grant, contract, or delegation whatsoever.' 22 Am. and Eng. Enc. Law, 921.

" 'The nature of the business done by banks in dealing with money, receiving deposits for safe-keeping, discounting paper, and loaning money, is such and is so affected with the public interest as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exists between the bank and its patrons, and the difficulty

which depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial condition of banks, are sufficient to justify police control and inspection'. 22 Am. and Eng. Enc. Law, 933.

"It seems to be settled by the United States supreme court that the banking business is affected with a public interest, and that it is within the power of the legislature to enact laws under their police power regulating the banking business. *Noble State Bank v. Haskell,* 219, U. S. 104. The rights and powers granted to the appellant bank in its charter from the legislature in 1872 are only such powers as might be exercised by an individual, subject to the regulation, and control of the legislature; and the legislature had no authority to surrender this power of control and regulation in the interest of the public welfare."

" 'No legislature can curtail the power of its successors to make such laws as may be deemed proper in matters of police.' *Stone v. State of Mississippi,* 101 U. S. 814 (headnote).

" 'The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe.' *Noble State Bank v. Haskell, supra,* (headnote).

"Thus, paragraph 3 of the headnote of the last above-cited case, it was held that the enactment of the banking law, similar to the one in Mississippi, was within the police power of the state, and did not infringe the obligation of a charter contract. On page 111 of 219 U. S., the court, in speaking of the police power, said:

" 'It may be said in a general way that the police power extends to all great public needs. *Camfield v. United States,* 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by prevailing morality or strong and preponderant opinion

to be greatly and immediately necessary to the public welfare. Among matters of that sort probably a few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.'

"The same conclusion was reached in *Shallenberger et al. v. First State Bank, supra,* involving the constitutionality of a Nebraska statute; and the constitutionality of the law was upheld, also, in the case of *Assaria State Bank v. Dolley,* 219 U. S. 121. In the case of *Boston Beer Co. v. Commonwealth,* 97 U. S. 25, the court, in discussing charter rights and the contract clause of the Federal Constitution, says:

" 'Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. They belong emphatically to that class of objects which demand the application of the maxim, *'Salus populi superma lex';* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama,* 94 U. S. 645.'

"In the case of *Stone, ex rel Railroad Com'rs. v. Y. & M. V. R. R. Co.,* 62 Miss. 607, it is said in the third paragraph of the headnotes:

" 'A grant to a railroad company, in general terms,

of authority to fix its rates of compensation, is not a renunciation of legislative power to secure reasonable rates. Every presumption is against such renunciation. But where it is clear that the legislature intended to partially renounce such control by conferring upon the company the right to fix its rates within limits, the fixing of such limits, in the charter, is a specification of what will be a reasonable exercise of the authority conferred, and it it to that extent a renunciation of the state's control.'

"Therefore, following the sound and safe conclusions reached in the foregoing authorities, we find the law to be"----------etc..

ASSIGNMENT OF ERROR.

The action of the court in affirming the decree, we respectfully assign as error.

ARGUMENT

The general proposition that, in the absence of constitutional provisions to the contrary, a bank charter is a contract protected by the Contract Clause of the Constitution of the United States is so well settled that we will not follow the lines of formal argument, but proceed at once to a discussion of the conclusions of the State Supreme Court. *Fletcher vs. Peck,* 9 Cranch. 87; *Darthmouth College v. Woodward,* 4 Wheat. 518; *Providence Bank v. Billings; Bank v. Sharpe,* 6 How., 301; *Bank of Commerce v. Tenn.,* 163 U. S., 134.

To begin with, we submit, it is manifest upon the face of the court's opinion that its decision is rested upon an indiscriminate collection of miscellaneous, inopposite, and

unrelated authorities that have no bearing upon the case at bar, or upon each other.

This court will note that the theory of appellant's bill is not opposed to the proposition that the banking business is affected with a public interest and generally subject to regulation. On the contrary, the bill rather assumes that the power to regulate once existed, and asserts that it was surrender to Appellant, and surrender in such a way that it cannot be recalled,—at least in so far as the statute under consideration is concerned.

The cases of *Noble State Bank v. Haskell, Shallenberger v. State Bank,* and *State Bank v. Dolley,* are all cases arising under the Fourteenth Amendment, and the definitions of the police power made in them are, of course, merely definitions of the powers of the State Governments under *that* clause of the Constitution, and nothing more. They have no bearing on the case at bar whatever, not even in so far as they hold that the banking business is affected with a public interest; for while the interest of the public in a business may justify its control, it does not *require* that the business be regulated, so as to prevent the legislature from granting it immunity:

> "A railroad corporation is a private corporation, although its *uses* are public, and a contract embodied in terms in its provisions, or necessarily embodies by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts." *Ga. R. R. Co. v. Smith,* 128 U. S. 174; and Mississippi cases cited *infra.*

In not one of these three *Bank Cases* was there the slightest vestige of contract right. In the *Noble Case,* Mr. Justice Holmes takes pains to point out that the charter was in the usual form and subject to modification:

"The reference to Article I, Section X, does not strengthen the plaintiff's bill. The only contract that it relies upon its charter. That is subject to alteration or repeal, as usual, so that the obligation could hardly be said to be impaired by the act before us."

Thus, it is obvious that running throughout the whole opinion of the court is a fatal neglect to distinguish between what the State Government *can do* under the *Fourteenth Amendment* and what it *cannot do* under the *Contract Clause;* and that definitions of the State's power under the former are confusedly given as defining its power under the later.

But by reason of the fact that this court has used the same term, police power, to describe different powers of the State, the court is able to make out what might be termed *a verbal case.*

In so far as Boston Beer v. Mass., and other similar cases cited by the court are concerned, we freely concede that there are certain powers of government which cannot be surrendered, or, rather, whose surrender are not within the protection of the Contract Clause,—and they may be exerted at any time.

But the inability of the legislature to surrender its power in certain respects arises solely from, corresponds to, and extends not one whit beyond the fundamental and inalienable rights of the citizen. The fundamental and inalienable character of the rights involved is at once the source and the limit of the inability.

Thus, in the terms of the Declaration of Independence, every person has a fundamental and inalienable right to "life, liberty, and pursuit of happiness"; and, probably, to all that is necessarily included therein, such as a reason-

able amount of peace, health, order, and morality in the comunity in which he resides.

But no person has a fundamental and inalienable right, or any right whatever, growing out of the ownership of property, or otherwise, to place his funds in a bank and have that bank inspected, supervised, and guaranteed by the State. So the trouble with the appellee's position here is plain.

The cases cited by counsel for appellee in their brief below, and by the Supreme Court in its opinion, were all cases holding that the legislature could not surrender or obstruct its power over the public health, morals, or similar primary interests of society. On the other hand, it is equally well settled, and settled not by definitions of the term "police power", but by the actual inclusion and exclusion of cases, that the power to legislate can be irrevocably surrendered by contract in those matters which go merely to the *industrial interests of the community.*

For example, the power of taxation, the fixation of railroad rates, etc., all effect the "public welfare" and are all originally within the "police power" of the State; yet the legislative power may be surrendered notwithstanding. *Home of the Friendless v. Rouse,* 8 Wall, 430; *Ga. R. R. Co. v. Smith, supra; Gulf, &c., R. R. Co. v. Adams,* 90 Miss., 559.

In *Walla Walla v. Water Co.,* 172 U. S. L, a bill of injunction was filed by the water company to enjoin the city of Walla Walla from erecting a water works, in pursuance of a city ordinance, the water company having itself a previous municipal contract. Amongst other questions discussed was the right of the city to surrender by contract its power in the premises, such power being a branch of

the police power. And the court said, on page 15, turning to that question:

> "The argument that the contract is void as an attempt to barter away the legislative power of the City Council", etc., etc. "This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the *peace, good order, health, or morals of its inhabitans; but it is to cases of this class that these rulings have been confined.*
>
> "If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which may prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. * * * *
>
> "But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

Even a more instructive case (simply because the language of the court is still more explicit) is that of *New Orleans Gaslight Co. v. Louisiana, etc., Co.*, 115 U. S., 650. In that case the complainant claimed an exclusive right by contract to use the streets of the city for the laying of mains and pipes, etc., for a term of fifty years. This court, in a most elaborate opinion, reviewing all of the authorities to that date, amongst other things, said:

"It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. * * * * For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the City of New Orleans, and its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the State could rightfully make provision. * * * *

"But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, *and, for that reason, is an object to which the police power extends,* it was not competent for one Legislature to limit or restrict the power of a subsequent legislature, in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health or the public safety, will constitute a contract, the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court, in which the nature and scope of the police power has been considered. * * * *

"That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts the obligations of which are fully protected against impairment by state enactments. * * * *

"We are referred to Butchers Union Co. v. Crescent City Co., 111 U. S. 746 (Bk. 28 L ed., 585), as authority for the proposition that the State is incapable of making a contract protected by the National Constitution, in reference to any matter within the reach of her police power in its broadest sense. But no such principle is there established. * * * *So far from the Court saying that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was: "While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to the two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals.* The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." * * * *

"The principle upon which the decisions in Beer Co. v. Massachusetts, Fertilizer Co. v. Hyde Park, Stone v. Mississippi, and Butchers Union Co. v. Crescent City, Livestock Landing Co., rest is that one Legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of these cases that statutory authority given by the State, to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract prevent-

ing the withdrawal of such authority, or the granting of it to others."

The court will observe that in that opinion many previous decisions by this court itself were cited and relied upon as authority for the proposition therein stated, in which the discrimination was firmly made between that phase of the police power which was necessary to secure the safety, the health and the morals of the public, from those other aspects of the police power, but no less part of the police power, which had relation only to industrial enterprises. We do not mean that the court itself used the expression "industrial enterprises", but it will be observed that that was the class of instances that the court was talking about in all of these decisions in which it was held that the legislature can make contracts binding, involving the surrender of police power.

Amongst the cases cited by the court in its opinion in the *New Orleans Gaslight Company Case,* 115 U. S., quoted from above, was the *Planters Bank v. Sharp,* 6 How., 301. This court will observe that not only was that *Planters Bank Case* a case about a bank and its charter right; but, also, was a case which went up by writ of error and appeal of this State. There the State, apparently growing out of our financial crisis, well known, of 1839, had passed a law prohibiting banks from negotiating and putting into the hands of third persons, the notes which they held. This law seemed to have been contrived in order to enable the banks' debtors to pay off those notes with the depreciated currency of the bank itself; and the statute provided, amongst other things, that if such a note executed to a bank, should be sued on by a third party, holder thereof, the fact of such transfer made a good plea in abatement.

This legislation the court, in this *Planters Bank Case,* 6 How., 301, held to be a violation of Article 1, Section 10, of the Federal Constitution (the Contract Clause), both because it impaired the obligation of the contract in the charter of the Bank; and, also, because it impaired the obligation of the contract in the debtor's note. But they distinctly held the former proposition.

Numerous other cases by this court, more or less conclusively support the position which we take. Amongst them are the following, most of which are cited in the opinion in 115 U. S., from which we quote above:

Chicago M. & St. L. P. Co. v. Minn., ex rel., R. & W. Com., 134 U. S., 418; 33 L. Ed., 970;
Detroit v. Detroit Citizens St. R. Co., 184 U. S., 388; 46 L. Ed., 592;
Bridge Proprietors v. Hoboken Co., 1 Wall., 117; 17 L. Ed., 571;
Binghamton Bridge, 3 Wall., 51; 18 L. Ed., 137;
West River Bridge Co. v. Dix, 6 How. 531; 12 L. Ed., 544;
Wilmington & W. R. Co. v. Reid, 13 Wall., 264; 20 L. Ed., 568;
Asylum v. New Orleans, 105 U. S., 362, 368; 26 L. Ed., 1130;
Home of the Friendless v. Rouse, 8 Wall., 430; 19 L. Ed., 495;
Gordon v. Tax App., Ct. 3 How., 133; 11 L. Ed., 529;
Farrington v. Tenn., 95 U. S., 679; 24 L. Ed., 561;
M. & O. R. Co. v. Tenn., 153 U. S., 134; L. Ed.;
Bank of Commerce v. Tenn., 153 U. S., 134; L. Ed.;
Am. Smelting & R. Co. v. Colo., ex rel. Lindsay, 204 U. S., 103; 51 L. Ed., 893;

In *Moore v. State*, 48 Miss., 147, relied on and quoted from by the Attorney-General, it was a question of morals.

It was a lottery case, and we conceded in the outset that on that branch of the police power the legislature could not bind its successors by a charter.

The Attorney-General quoted at length from the head-notes and the text, in the case of *Stone v. Y. & M. V. R. R. Co.*, 62 Miss., 607, and *R. R. Commission v. G. & S. I.* 78, Miss., 761.

We knew of no better authority for us than Judge Campbell's opinion in 62 Miss. case, quoted from. It would be long to extract. This court will read the opinion for itself, and it will see that there Judge Campbell stated explicitly (and that portion of his opinion is quoted in the Attorney-General's brief) that the legislature "may create corporations and where they are not part of the machinery of government the franchise cannot be resumed by the legislature, or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as molded by the judicial utterances of half a century of constitutional government in America". Other expressions of the Judge's opinion might be quoted; and it will be observed that in that case this court, under that opinion, expressly held that the legislature could, by a charter provision, give to a railroad company a right to fix its freight rates, and put that right beyond any reach of any subsequent legislature, acting through a railroad commission, or otherwise, and placed the protection of the right under the charter and the Contract Clause of the Federal Constitution,—just where we put it. Thus, the court so held in a matter of the fixation of freight rates. That is to say, in a public matter which was much more vital, much more important, and much more intimately felt, to and by the entire citizenship of a state, than any

mere matter of regulating a bank. To say nothing of the enormous disproportion in the size of business between the two considerations, it is true that every citizen is bound, either directly or indirectly, to pay freight rates; and no citizen is bound to patronize a bank, unless he wants to do it. It is the inexorable difference in the economic conditions of the country.

There was, of course, a question in the *Y. & M. V. R. R. Co. Case*, above, of the construction of the charter privilege; and this court held that the charter did give the right to the Y. & M. V. R. R. Co. to fix its own freight rates within a certain maximum limit; and that its right so to fix them was not subject to legislative deprivation or alteration.

By the other decision, in the *N. J. & C. Case*, made at the same time, and cited in the Attorney-General's brief (62 Miss., 646), this court held that the language of *that* charter constitutes a mere provision that the Company might enact by-laws fixing rates, etc.; that this constitutes the mere formal enumeration of powers, and was not susceptible of the construction placed upon the other charter in the *Y. & M. V. Case;* and, consequently, they held that the freight rates so fixed by the M. J. & C. R. R. Co. were subject to supervision by the Railroad Commission, in so far as the Commission could see that the rates so fixed were reasonable. The difference in the decisions in the two cases was merely a difference in the construction of language employed in the two charters. That is a different question from the one which we are now occupied with. The essential position of the Attorney-General is not a question so much of the construction of the charter of the Bank of Oxford, as his leading proposition is to the effect that to give such a charter was beyond the constitutional power

of the legislature. It was a surrender of its police power; and on that point, the decision of Judge Campbell, in 62 Miss., and the decision of Judge Calhoun, in 78 Miss., is square against him. It is impossible to say that if the police power does not stand in the way of a binding surrender of legislative powers in the matter of railroad rates, that it shall stand in the way in the matter of the control of a bank.

Without recapitulation, we insist that the case made by the bill meets all the refinements of the *Dartmouth College Case*, and that appellant is entitled to the relief prayed for.

Respectfully submitted,

B. L. MAYES,
Counsel for Appellant.

I hereby certify that I have this, the 20 day of December, 1917, sent a true copy of the foregoing brief to opposing counsel, by United States mail, postpage prepaid.

B. L. MAYES.

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In the Supreme Court of the United States

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In Error to the Supreme Court of the State of Mississippi

Brief for the Defendants in Error

STATEMENT

The single, but comprehensive, assignment of error relied upon by the appellant brings before this Court the question of the validity, under the contract clause of the Fourteenth Amendment, of Chapter 124, Laws of the State of Mississippi, 1914, known as the Mississippi State Banking Act.

The bill filed by the appellant in the Chancery Court of Hinds County, as well as the opinion of the Supreme Court of Mississippi, both of record in this case, contain pertinent provisions of the Act complained of, but in order that the entire scope and objects of the law may at once engage the attention of the Court, I am hereinafter setting out verbatim the title to the said Act; for while the title is, of course, no part of the Act itself, it constitutes "the best brief summary of its purposes."

Millard v. Roberts, 202 U. S. 429, 437.

"AN ACT establishing a banking department for the State of Mississippi, creating a board of bank commissioners, prescribing their qualifications, duties and compensation, providing for the election of State bank examiners, prescribing their qualifications, duties and compensation, defining

what shall constitute a bank and banking business in the State of Mississippi, fixing the capital required to do a banking business, and providing for the examination, regulation and control of banks and banking business conducted by corporations, other than national banks and postal savings banks and fixing the assessment for the revenues of the department, fixing qualifications and liability of officers, stockholders and directors of banking corporations; fixing the qualifications and liability of persons, firms and corporations in the banking business; providing for the payment of deposits to minors and other persons under disability and on joint account; prohibiting banking except under the provisions of this act; providing for the liquidation of banks and the distribution of the assets thereof; providing for giving publicity to deposits more than five years old; and prescribing penalties for the breach of any of the provisions thereof, and to provide a system for guaranteeing deposits, and for other purposes, without expense to the State."

It is to be observed from the scope and language of said Act that it is practically a rescript of the Oklahoma Act heretofore upheld in this Court.

Noble State Bank v. Haskell, 219 U. S. 104.

It likewise involves the principles laid down in *Shallenberger v. First State Bank*, 219 U. S. 119.

However, in an effort to bring the case at bar beyond the purview of the above decisions, the appellant contends that the charter granted by the Legislature of the State of Mississippi by a special Act of 1872 to the Bank of Oxford is in its terms irrevocable and unalterable, and, consequently, the said bank cannot be subjected to regulatory laws, such as the 1914 State Banking Act thereafter enacted, without impairing the obligations of a contract prohibited by the Fourteenth Amendment to the Federal Constitution.

The provision of appellant's charter, for which the protection of the Fourteenth Amendment is sought, is found in Section 4 thereof, and is as follows:

"That the business of the said bank shall be confided to and controlled by its stockholders under such rules of law and regulations as said company may see fit to adopt, provided that the same be not in conflict with the Constitution of the United States, or of this State."

SCOPE OF ARGUMENT

1. It is the purpose of this brief to take issue with the suggestion of appellant's counsel and to insist that the regulation and control of the banking business is to remain at all times a valid exercise of the police power of the State and cannot be bargained away by the Legislature thereof.

2. That the regulation complained of in this case does not contravene the contract clause of the Fourteenth Amendment to the Federal Constitution.

3. That the words of the charter clause in issue are insufficient in any event to constitute a contract under the Fourteenth Amendment.

4. That the plain meaning of the charter clause is, and the manifest legislative intent in enacting it was, that the control and regulation of the business of the said bank was to be exercised subject to the provisions of "the Constitution of the United States and of this State" *as the same may from time to time be changed.*

5. That under Section 178 Mississippi Constitution, 1890, the Legislature is specifically empowered to alter, amend or repeal charters of corporations.

THE REGULATION AND CONTROL OF THE BANKING BUSINESS IS A VALID EXERCISE OF THE POLICE POWER OF THE STATE.

In *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 55 L. Ed. 112, 116, this Court, sustaining the Oklahoma Banking Act, said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v.* U. S. 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. * * * *

"We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong."

The following cases are cited in the foregoing opinion: *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291, 100 N. W. 358; *Weed v. Bergh*, 141 Wis. 569, 25 L. R. A. (N. S.) 1217, 124 N. W. 664; *Com. v. Vrooman*, 164 Pa. 306, 5 L. R. A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; *Myers v. Irwin*, 2, Serg. & R. 368; *Myers v. Manhattan Bank*, 20 Ohio, 283, 302; *Atty. Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371, 377.

The same conclusion was reached in *Shallenberger v. First State Bank*, 219 U. S. 117, involving the constitutionality of the Nebraska statute. And the constitutionality of another similar statute was upheld in *Asaria State Bank v. Dolley*, 219 U. S. 121, 55 L. Ed. 123.

In the case of *Boston Beer Co. v. Mass.*, 97 U. S. 25, 24 L. Ed. 991, this Court, in discussing charter rights and the contract clause of the Constitution of the United States, said:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals. The legislature cannot, by any contract, divest itself of the power to provide these objects. They belong emphatically to that class of obligations which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Ala.*, 97 U. S. 302."

Sustaining the same proposition are the following cases:

Northern Pacific Ry. Co. v Duluth, 208 U. S. 583, 596; *N. Y. and N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Chicago B. and Q. R. Co. v. Illinois*, 200 U. S. 561; *Lake Shore and M. S. R. Co. v. Ohio*, 173 U. S. 285, 292; *Gillman v. Philadelphia*, 3 Wall. 713, 729; *Poung v. Turck*, 95 U. S. 459, 464; *Hannibal and St. J. R. Co. v. Husen*, 95 U. S. 470; *Bacon v. Walker*, 204 U. S. 311; *Barbier v. Connally*, 113 U. S. 31; *Lawton v. Steele*, 152 U. S. 133.

In *Barbier v. Connally*, *supra*, the object of the police power is stated to be, "To prescribe regulations and promote health, peace, morals, education and good

order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

The sphere of the police power is thus stated in *Lawton v. Steele, supra*:

> "It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. * * *
>
> "Beyond this, however, the state may interfere whenever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public are, but what measures are necessary for the protection of such interests."

REGULATION AND CONTROL OF THE BANKING BUSINESS BY A STATE IS NOT SUBJECT TO THE LIMITATIONS OF THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION SINCE NO STATE CAN DIVEST ITSELF OF THIS ESSENTIAL POLICE POWER.

The regulation of banks affords the necessary security to the public to avert panics and prevent distress on the part of the public which is compelled in the transactions of modern life to patronize our banking institutions. The soundness of our financial institutions is the measure of a State's prosperity and therefore the banking business is now so affected with a public interest that its regulation and control become a governmental function; and since a State through its Legislature recognizes that unregulated banking is demoralizing to the public and inimical to the public welfare, this Court, under its decisions will not interfere with such exercise of the State's police power. The State itself cannot contract away this essential governmental power in the interests of any person or corporation.

In *Stone et al. v. State of Mississippi*, 111 U. S. 814, 25 L. Ed. 1079, this Court said in reference to the power of the State to contract away governmental rights:

> "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of the public health and morals and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which from the very nature of things must 'vary with varying circumstances.' They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.
>
> "The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but as we have just seen, may properly be made *mala prohibita*."

Likewise unregulated banks may be made *mala prohibita*, and all that the appellant can claim by the legislative charter in question is a suspension of certain governmental rights in its favor subject to withdrawal at any time. It has in legal effect nothing more than a license to conduct its business on the vague terms specified in its legislative charter until abro-

gated by the sovereign power of the State in the enactment of more positive and definite regulations. It was merely a permit bestowing on it certain formal emoluments of existence subject to future legislation and constitutional control or withdrawal.

This power of prohibition was expressly decided in the *Noble State Bank* case, *supra*, when it was said that "the police power of a State extends to the regulation of the banking business and even to its prohibition, except on such conditions as the State may prescribe."

Chief Justice Waite in the Railroad Commission Cases 116 U. S. 307, 29 L. Ed. 636, said:

> "This power of regulation is a power of government continuing in its nature and if it can be bargained at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. Ed. 939, 955, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

The conception of the Supreme Court of Mississippi in regard to the State's police power in such regulations is well illustrated in the case of *Moore v. The State*, 48 Miss. 147, where the Court, to quote from paragraphs 2, 3, and 4 of the syllabus, laid down the following rule:

> "Authority to raise money by lotteries, or to sell spiritous liquors, are not protected by the prohibition in the Constitution of the United States against impairing the obligations of contracts; it not being the intention of that prohibition to restrain the police power of the states in the preservation of the public morals.

"As to the supervision and control of internal police, the legislative power of the states is unaffected by that clause of the Constitution of the United States, which forbids the states to pass any law impairing the obligation of contracts. While the states may not repeal or materially alter charters to promote charities, eleemosynary institutions established by private means, and the like, the power is unrestrained over internal police, sanitary and moral; *Dartmouth College v. Woodward*, 4 Wheat. U. S. 518, 4 L. Ed. 629; and the State cannot abnegate or surrender the duty which is perpetually upon it to consult the physical and moral good of the people."

In *Stone et al. v. Y. & M. V. R. Co.*, 62 Miss., 607, in construing a grant to a corporation of powers in a chapter, the court held, to quote from the head notes:

"A grant to a railroad company, in general terms, of authority to fix the rates of compensation is not a renunciation of legislative power to secure reasonable rates. Every presumption is against such renunciation. But where it is clear that the legislature intended to partially renounce such control by conferring upon the company the right to fix its rates within limits, the fixing of such limits, in the charter, is a specification of what will be a reasonable exercise of the authority conferred, and is to that extent a renunciation of the State's control.

"Even where the right of a railroad company to regulate its charges for passengers and freights is secured by its charter, the State may create a commission or other agency to supervise the operations of such road to see that the company keeps within its charter limits, and to enforce such police or other reasonable regulations as the State may see fit to adopt for the government of the road, within the State, in the interests of the community, and consistent with the full enjoyment of the company's contract rights."

See also *Railroad Commission v. G. and S. I. R. R. Co.*, 78 Miss. 761, 29 So. 789.

In the *Y. and M. V. R. R.* case, above cited, Judge Campbell, at page 642, said:

> "A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable."

Again in the case of *Stone v. N. J.* and *C. R. R. Co.*, 62 Miss. 646, the Court laid down the following rule, as contained in the first paragraph of the head notes:

> "Where a charter granted by a State to a railroad company authorizes the company to 'fix, regulate, and receive tolls and charges for transportation of persons and property', there is annexed to such grant the implied condition that the tolls and charges fixed shall be reasonable, and the legislature retains the power to secure, through a commission established for the purpose, conformity by the company to the standard of reasonableness in its rates."

All of the foregoing Mississippi cases have been upheld by this Court and this measure of the State's power to supervise, regulate and control corporations has been thereby approved. The same principles have been stated and recognized by Mr. Cooley in his Constitutional Limitations, 7th Ed., pages 883 to 888.

In *Manigault v. Springs*, 199 U. S. 472, 50 L. Ed. 274, the question of impairment of a contract by a State statute enacted in the exercise of the police power to subserve the drainage of lowlands for their reclamation was involved, and this Court said on page 480 of the official report:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be

affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

"While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with."

The following cases were then considered and cited by this Court: *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 672, 29 L. Ed. 516, 524, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 Sup. Ct. Rep. 273; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.

The Court in this case recognized the distinction urged by the appellant in the case at bar between that class of cases providing for the safety and morality of the public and those affecting the public welfare in its broader sense, that is to say, in its economic or industrial aspects, and for this reason it is interesting to note that the Court said:

"It only remains to consider, in connection with this branch of the case, whether the act of the general assembly of 1903 was a proper exercise of the police power of the State. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of such lands."

This case, if standing alone, constitutes an utter refutation in unequivocal terms of appellant's contention that the exercise of police power is subject to the limitations of the Fourteenth Amendment when applied to the second class of cases mentioned, above, to-wit: those affecting the public only in an economic or industrial aspect.

It is common knowledge that the history of the economic and industrial crises of this country, with their consequent anxiety, distress and alarm to the public, is to a large extent the history of unsound and unregulated banking. The stability of commerce and the equalization of rates of exchange, both domestic and foreign, depend upon the free negotiability of private and public securities realized through the banking institutions of the country.

"The nature of the business done by banks in dealing with money, receiving deposits for safe-keeping, discounting paper, and loaning money, is such, and is so affected with the public interest as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exist between the bank and its patrons, and

the difficulty which depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial conditions of banks, are sufficient to justify police control and inspection." 22 Am. and Eng. Ency. of Law 933, and quoted with approval by the Supreme Court of Mississippi in this case.

THE STATE'S POLICE POWER OVER BANKS WAS EXPRESSLY RESERVED BY THE CONSTITUTION OF 1869, IN EFFECT IN 1872, AND HAS BEEN BROUGHT FORWARD IN THE PRESENT CONSTITUTION OF 1890.

In the foregoing pages the right of the State to exercise control over banks has been predicated upon its inherent police power without regard to the provisions of the Constitution then and now in force.

Section 17 of Article 12, of the Mississippi Constitution of 1869, reads as follows:

> "SECTION 17.—Liabilities of banks, associations, and other corporations shall be secured by legislative enactments; but in all cases no stockholder shall be individually liable over and above the stock by him or her owned, unless so specified in the articles of association or act of incorporation."

It is, therefore, respectfully submitted that this section of the Constitution not only gives the Legislature power to enact any law deemed proper and having a reasonable tendency to secure liabilities or to provide and safeguard creditors of a bank, or other corporation, in their rights against such corporation, but made it the duty of the Legislature to enact such laws. It cannot, and has not been contended that the means adopted by the State in enacting the Banking Act of 1914, has no logical or reasonable relation to the purpose sought, appellant's only contention being that it is altogether immune from any regulation whatsoever. In addition to the reservation contained in the above section of the Constitution of 1869, the gen-

eral policy of the State then in force was further vitalized by Section 2408 of the Code of 1871, which reads as follows:

> "Nothing contained in this chapter shall be so construed as to interfere with the powers of the Legislature in reference to establishing corporations by regular enactment; and the Legislature may, at pleasure, repeal any of the charters established under the provisions of this chapter."

Such was the law and policy of the State in 1872, when appellant's charter was granted. By the Constitution of the State adopted in 1890, it was provided in Section 190 thereof that, "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the well-being of the State."

By Section 178 of the present Constitution of 1890, it is provided that:

> "Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so. Provided, however, that no injustice shall be done to the stockholders."

It follows from the above provisions of the Constitutions that the appellant's charter was taken subject to the provisions thereof and to all changes that may be from time to time made therein.

APPELLANT'S CHARTER GRANTED WITH REFERENCE TO LIMITATIONS OF FUTURE CONSTITUTIONS AS WELL AS THE THEN EXISTING ONE.

It cannot be reasonably supposed that when the charter was granted to the Bank of Oxford it was contemplated either by it or by the State that no more

changes were to be made in the organic law of the State, or that no more police regulations would be enacted for the safety and welfare of the public in dealing with the ever growing banking system of a progressive State.

In *Freeport Waterworks Co. v. Freeport*, 180 U. S. 587, 45 L. Ed. 679, this Court, following the Supreme Court of Illinois, held that where a city council was authorized to contract with any person or corporation to construct and maintain waterworks at such a rate as may be fixed by ordinance for a period not exceeding thirty years, the words "fixed by ordinance" being capable of application so as to make one ordinance endure for a period of thirty years for which the contract was made, or to give the right to pass ordinances from time to time regulating rates, the latter construction was adopted.

A similar construction of a State law is found in a recent decision of this Court in *Puget Sound Traction, Light and Power Co. v. Public Service Commission of the State of Washington*, 244 U. S. 574, 61 L. Ed. 1325, where quoting from paragraph one of the syllabus, it was held that:

> "An order of the Public Service Commission created by Washington laws, 1911, Chapter 117, requiring street railway passengers to be carried beyond the limits of a particular franchise, does not impair the obligation of any contract contained in the municipal ordinances granting street railway franchises which give the street railway company the right to make rules for the management and operation of the lines, 'provided that such rules and regulations shall not conflict with the laws of the State' and the charter and ordinances of the City, since this, by fair construction, means the laws as they shall from time to time exist, and the act creating the Commission and the orders made by the Commission are within this description."

It is a familiar rule of construction, many times decided by this Court, that where there is any ambiguity or doubt arising out of the terms used by the Legislature in conferring power, it must be resolved in favor of the public. Every reasonable doubt of power is resolved against the grantee and the power denied. This is especially true as to grants and franchises of special privileges.

Freeport Waterworks Co. v. Freeport, supra.

Chief Justice Waite in the Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636, approved the foregoing utterance, and added:

> "This rule is elementary and the cases in our reports where it has been considered and applied are numerous."

NO INJUSTICE TO STOCKHOLDERS BY THE REGULATIONS IMPOSED BY THE STATE BANKING ACT.

As previously suggested, there is no claim of any specific unreasonable limitation or injustice imposed on the stockholders by the State Banking Act complained of and none can be shown. Corporations are the creatures of statute. The right of an individual to make contracts is a natural and inherent right. But a corporation is not a person; it is an artificial person and derives its right to contract solely from legislative enactment. The stockholders of this corporation received their charter from the Legislature subject to all the provisions of the Constitution and the inherent police power of the State as if the same had been in so many terms written into the charter. If afterwards they did not agree with the changed legislative policy of the State which, as the Court said in *Stone et al. v. State of Mississippi, supra*, may "vary with varying circumstances," they could elect to wind up the affairs of the corporation and move from the jurisdiction of the state.

In *R. C. L.*, Vol. 6, subject Constitutional Law, paragraph 111, the following rule is announced:

"On frequent occassions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. Under the American system of government by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material."

In the same authority, paragraph 154, the following language is used:

"The legislature is given a large discretion in reference to the means it may employ to promote the general welfare. It is for the legislature alone to judge what means are necessary and appropriate to accomplish an end which the constitution makes legitimate; and hence, the courts cannot undertake to decide whether the means adopted by the legislature are the only means, or even the best means, possible to attain the end sought, for such course would vest the exercise of the police power of the state in the judicial department. It has been said that the methods, regulations and restrictions to be imposed to attain, so far as may be, results consistent with the public welfare, are purely of legis-

lative cognizance. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen."

There is nothing in the Mississippi State Banking Act that in any manner infringes the charter franchises of the Bank of Oxford. While appellant's brief challenges the constitutionality of the act only in general terms without pointing out the terms of the Act specifically complained of, this Court will observe that the dominant features of this Act is the system of guaranteeing the payment of deposits. This is a safeguard well within the legislative power of the State. The stockholders can not be heard to complain of any incidental inconvenience or additional liability under a law the adoption of which is voluntary. The regulation of the future relations between debtor and creditor is always a valid exercise of tne legislative power, and this inalienable right of the State is paramount to that of any person or corporation.

It is therefore submitted that the determination of public exigencies that prompted the passage of the State Banking Act involves a legislative determination of facts upon which its decision is final and binding.

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